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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 R Alexander Acosta,
10 Plaintiff,

No. CV-16-02737-PHX-ROS

ORDER

11 v.

12 Austin Electric Services LLC and Toby
13 Thomas,
14 Defendants.

15
16 Plaintiff Secretary of Labor (“the Secretary”) alleges Defendants Austin
17 Electric Services LLC and Toby Thomas, Austin Electric’s President (collectively,
18 “Defendants”), failed to pay employees overtime compensation and to keep employee
19 records, in violation of the Fair Labor Standards Act (“FLSA”). In anticipation of the
20 limited reopening of discovery, Defendants moved for Rule 37(c) sanctions to exclude
21 29 of the Secretary’s trial witnesses and all damages calculations beyond July 2015.
22 (Doc. 185.) For the foregoing reasons, Defendants’ motion will be granted in part and
23 denied in part.

24 **BACKGROUND**

25 The Secretary alleges Defendants violated the FLSA by failing to pay employees
26 overtime compensation and failing to keep employee records. The case proceeded to
27 discovery, which, except as discussed below, ended in October 2017. Trial is set to begin
28 on January 15, 2019. (Doc. 172.)

1 A key component of the Secretary’s case is the testimony of informer witnesses—
2 current and former employees of Defendants who were allegedly denied overtime
3 compensation. Because the identities of these witnesses are protected by the
4 government’s informants privilege, the Court allowed the Secretary to withhold the
5 identities of informer trial witnesses until shortly before trial. The Court ordered the
6 Secretary to disclose the identities of its informer witnesses who will testify at trial—as
7 well as any unredacted documents relating to those witnesses—by October 1, 2018.
8 (Docs. 102, 172.)

9 Following these disclosures, discovery is scheduled to reopen for 15 days,
10 beginning October 15, 2018 and ending November 2, 2018. During this time, Defendants
11 will have the opportunity to “interview and/or depose the Secretary’s informer witnesses
12 and other individuals who may be disclosed in the documents and information the
13 Secretary produces.” (Doc. 172 at 20:14–16.)

14 On October 3, 2018, after receiving the Secretary’s disclosure of 40 witness
15 names, Defendants filed a motion for Rule 37(c) sanctions. (Doc. 185.) Defendants
16 argue the Secretary failed to disclose required information relating to the Secretary’s
17 informer witnesses and ask the Court to exclude 29 of the 40 witnesses. In addition,
18 Defendants argue that damages calculations beyond July 2015 should be excluded due to
19 untimely disclosure.

20 The Court granted Defendants’ request for expedited briefing, in consideration of
21 depositions scheduled to begin on October 15. (Doc. 188.) The Secretary filed a
22 response to Defendants’ motion on October 11, (Doc. 189), and Defendants filed their
23 reply on October 12. (Doc. 191.)

24 **I. Rule 37(c) Sanctions**

25 As an initial matter, Defendants’ motion for Rule 37(c) sanctions does not violate
26 meet-and-confer requirements regarding discovery disputes. Unlike Rule 37(a), Rule
27 37(c) does not require a certification that the “the movant has in good faith conferred or
28 attempted to confer.” Fed. R. Civ. P. 37(a)(1). “Any local rule requiring a conference

1 prior to the court’s imposition of sanctions under Rule 37(c) would be inconsistent with
2 Rule 37(c) and, therefore, unenforceable.” *Hoffman v. Constr. Protective Servs., Inc.*,
3 541 F.3d 1175, 1179 (9th Cir. 2008), *as amended* (Sept. 16, 2008); *see also Dayton*
4 *Valley Inv’rs., LLC v. Union Pacific R.R. Co.*, No. 08-cv-00127, 2010 WL 3829219, at *2
5 (D. Nev. Sept. 24, 2010) (“Ultimately, this is a non-issue as personal consultation is not
6 required prior to a motion for sanctions pursuant to Rule 37(c).”). Accordingly, the Court
7 will not deny Defendants’ motion on this basis.¹

8 **II. The 29 Witnesses**

9 Defendants argue the Secretary violated Rule 26(a) and the Court’s Orders by
10 failing to disclose required information for all 40 witnesses. However, because the
11 Secretary provided limited disclosures relating to 11 witnesses,² Defendants request the
12 exclusion of only 29 of the 40 witnesses.

13 According to Defendants, the Secretary failed to disclose the 29 witnesses’ contact
14 information and descriptions of the subject matter of each witness’s anticipated testimony
15 in violation of Rule 26(a). In addition, the Secretary failed to produce unredacted
16 documents—including interview-related documents and statements from employees—
17 relating to the 29 informer witnesses, as required by this Court’s Orders. In support of
18 their argument, Defendants point out the 29 witnesses “do not make a single appearance
19 in the DOL’s production of interview-related documents—no employee statements, no
20 interview summaries, no interview notes, no notes of calls made to employees, no notes
21 of calls from employees, and no notes of meetings with employees.” (Doc. 185 at 5:5–
22 8.) Pursuant to Rule 37(c), Defendants request the Court sanction the Secretary by
23 excluding the 29 witnesses. Fed. R. Civ. P. 37(c) (“If a party fails to provide information
24 or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that
25 information or witness to supply evidence on a motion, at a hearing, or at a trial, unless

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27 ¹ In any event, Defendants’ motion is one for Rule 37(c) sanctions rather than a discovery
motion.

28 ² Defendants note the Secretary produced interview summaries for 11 witnesses.
Defendants plan to proceed with depositions of some these witnesses when discovery
reopens. (Doc. 185 at 5, n.6.)

1 the failure was substantially justified or is harmless.”). Although Defendants did not cite
2 to Rule 37(b), which allows for sanctions for a failure to comply with a court order, the
3 Court notes it is applicable here. Fed. R. Civ. P. 37(b).

4 The Secretary responds that 86 pages of documents that three informer witnesses
5 had provided to the Secretary were produced, as well as an interview statement for one of
6 the three witnesses. (Doc. 189.) For the remaining 26 witnesses, the Secretary states that
7 no responsive documents exist because “[t]hese 26 witnesses did not provide any
8 documents to the Secretary, nor did the Secretary previously redact documents about
9 them solely on the basis of the Government Informants Privilege.” (Doc. 189 at 1:26–
10 28.) The Secretary explains meetings with many of these witnesses occurred “only
11 recently and *after fact discovery closed*, obviously preventing [him] from previously
12 redacting documents about them.” (Doc. 189 at 1:28–2:1-2 (emphasis in original).)

13 In reply, Defendants counter that the Secretary’s lack of a single document about
14 26 witnesses “strains credulity” and ask the Court to conduct an *in camera* review of the
15 Secretary’s documents. (Doc. 191 at 7:4–5.)

16 The Court’s Orders regarding informer witness disclosures are clear: The
17 Secretary “shall disclose the identities of its informer witnesses who will testify at trial,
18 and any unredacted documents relating to them, no later than October 1, 2018.” (Doc.
19 172 at 20:10–12); *see also* Doc. 102 at 5:12–17 (“[T]he Secretary shall produce the un-
20 redacted documents relating to the Secretary’s informer witnesses who will testify at trial,
21 including any documents these informer witnesses provided to the Secretary as well as
22 those documents previously redacted on the basis of the Government Informants
23 Privilege (to the extent not protected by other privileges or the work product doctrine[.]”)

24 Nowhere in the Orders does the Court suggest the Secretary’s production shall be
25 limited exclusively to (1) documents provided to the Secretary by informer witnesses; or
26 (2) documents previously withheld or redacted based on the government’s informants
27 privilege. In parts of the response, the Secretary apparently concludes that there are no
28 responsive documents relating to 26 witnesses because no documents fall under these two

1 mandatory categories. (Doc. 189 at 1:26–28, 7:24–28.) If this is indeed the Secretary’s
2 interpretation, it plainly violates the Court’s Orders: All documents relating to informer
3 trial witnesses that are not protected by “other privileges or the work product doctrine”
4 should have been produced, regardless of how and when the Secretary obtained or
5 generated them.

6 To the extent the Secretary has failed to produce trial witness–related documents
7 solely because they did not fall under the two categories, the Secretary is now ordered to
8 produce any such information no later than October 16, 2018. Those witnesses may well
9 be excluded under Rule 37(c), unless the Secretary’s failure to disclose was substantially
10 justified or harmless. With regard to documents withheld due to other privileges or the
11 work product doctrine, the Secretary shall produce, no later than October 16, 2018, a
12 privilege log indicating all responsive documents withheld on the basis of any privilege.
13 Defendants’ request for *in camera* review, raised for the first time in reply, is denied as
14 disproportionate and unnecessary at this time. *See, e.g., Diamond State Ins. Co. v. Rebel*
15 *Oil Co., Inc.*, 157 F.R.D. 691, 700 (D. Nev. 1994) (“Resort to *in camera* review is
16 appropriate only after the burdened party has submitted detailed affidavits and other
17 evidence to the extent possible.”).

18 **III. Damages Calculations**

19 Defendants ask the Court to exclude the Secretary’s damages calculations beyond
20 July 2015 due to untimely disclosure. According to Defendants, the Secretary’s back
21 wages calculations have increased from \$691,608.29 during discovery to \$1,124,435.12
22 in October 2018. Notably, the Secretary’s damages calculations that were disclosed
23 during discovery did not include any damages calculations beyond July 2015. Rather, in
24 the Pretrial Disclosures of the Secretary, dated October 23, 2017, the Secretary stated
25 “[b]ackwage calculation worksheets” would be offered at the time of trial. (Doc. 185,
26 Ex. 7 at 7:13.)

27 In the response, the Secretary argues that because Defendants’ FLSA violations
28 are allegedly ongoing, the Secretary’s back wage calculations would naturally increase

1 with time. Furthermore, because the Secretary added 99 individuals to the case in April
2 2018, the updated damages calculations include back wages for those individuals. The
3 Secretary also points out that final calculations will depend on the supplemental
4 disclosures of payroll information that Defendants have yet to disclose.

5 The Court agrees with the Secretary that Defendants were not prejudiced by the
6 timing of damages disclosure. Fed. R. Civ. P. 37(c) (providing for the exclusion of
7 information for a failure to disclose “unless the failure was substantially justified or is
8 harmless”). Throughout this litigation, Defendants have always known that the Secretary
9 alleges ongoing violations of the FLSA and that damages calculations would increase
10 with time. Defendants also knew the Secretary added 99 individuals to this case in April
11 2018 and that those individuals claim additional back wage damages. Furthermore, the
12 Secretary states the supplemental back wage calculations provided use the same
13 methodology as previous calculations, of which Defendants are well aware. Defendants
14 both knew and should have expected the Secretary’s damages calculations would
15 increase. Therefore, Defendants’ motion to exclude damages calculations is denied.

16 **IV. The Other 11 Witnesses**

17 Defendants do not request the exclusion of the other 11 trial witnesses but insist
18 the Secretary has not fully complied with his disclosure obligations. (Doc. 185 at 5.)
19 While the Secretary provided interview summaries for these 11 witnesses, other required
20 information was not disclosed, including contact information for the witnesses. The
21 parties dispute whether Defendants were already in possession of such information and
22 whether they were harmed by this failure to disclose. To the extent the Secretary has up-
23 to-date contact information for trial witnesses that Defendant does not have, the Secretary
24 shall disclose that information no later than October 16, 2018.

25 **V. Documents Unrelated to Trial Witnesses**

26 The parties dispute the production of a number of documents unrelated to the trial
27 witnesses. In their reply, Defendants curiously argue that the Court intended to include
28 documents unrelated to trial witnesses when it ordered disclosure of the “the un-redacted

1 documents relating to the Secretary's *informer witnesses who will testify at trial*,
2 including any documents these informer witnesses provided to the Secretary as well as
3 those documents previously redacted on the basis of the Government Informants
4 Privilege." (Doc. 102 (emphasis added).) This reading defies all logic. The literal
5 import of this Order does not contemplate production of documents unrelated to trial
6 witnesses. Accordingly, the Court will not impose sanctions for these failures to produce.


7 **VI. Attorneys' Fees**

8 The Court will not impose additional monetary sanctions and each party shall bear
9 its own costs.

10 Accordingly,

11 **IT IS ORDERED** Defendants' Motion for Rule 37(c) Sanctions, (Doc. 185), is
12 **GRANTED IN PART** and **DENIED IN PART**.

13 Dated this 15th day of October, 2018.

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17 Honorable Roslyn O. Silver
18 Senior United States District Judge
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